83-1098



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

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ESCONDIDO IMPORTS, INC.,

Plaintiff/Appellant,

v.

STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES,

Defendant/Respondent.

BILLY D. NORMAN, ETC.,

Plaintiff/Appellant,

v.

STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES,

Defendant/Respondent.

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ON APPEAL FROM THE COURT OF APPEALS, FOURTH APPELLATE DISTRICT, DIVISION ONE

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# JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED

Is due process under the Fourteenth Amendment to the Constitution of the United States afforded an occupational licensee if, after assessment of a fine by a regulatory body without a hearing, the licensee is compelled to risk loss or suspension of its occupational license in order to obtain its first hearing regarding the validity of the assessment of the fine?

## SUBSIDIARY QUESTION

Actually the California statutes at issue herein do not state that the licensee is entitled to a hearing upon the merits of the assessment at any time, even at the license revocation hearing. If, arguendo, merits of the assessment may be heard at such a hearing, is such a hearing timely in light of the fact that the original sanction imposed, a fine, will escalate to possible loss of license at the hearing which is the first hearing afforded the licensee regarding the validity of the assessment?

## QUESTION PRESENTED WITH STATUTORY CITATION

This consolidated appeal presents the issue of whether due process is provided to occupational licensees by California Vehicle Code Sections 4456.1, 11705(a)(8), 9263 and 11509(a)(10). One set of statutes regulates automobile dismantlers and one set regulates automobile dealers. Texts of the relevant portions are set out at page 4 to page 10.

Restated by citation to the California Vehicle Code statutes at issue herein, is procedural due process afforded by statutes wherein an occupational licensee can be assessed a fine without a hearing under California Vehicle Code §4456.1 (dealers) or §9263 (dismantlers) and, if the licensee fails to pay the assessed amount, is subjected to possible loss or suspension of the occupational license for failure to pay the fine? California Vehicle Code §4456.1 and §11705(a)(8) (dealers) and California Vehicle Code §11509(a)(10) (dismantlers). The Court's

attention is invited to the fact that there is no hearing before or after assessment except the hearing where loss of license for failure to pay the fine is a possible sanction.

Quotation from the California Department of Motor Vehicles' formal response to a demand for hearing helps bring the question into focus from the licensee's point of view. The letter was in response to Appellant Norman's demand for a hearing:

> ". . .8. With respect to the billing of investigative service fees, the Legislature has not provided for a hearing against a licensed dismantler who refuses to pay billed fees.
>
> 9. Vehicle Code Section 11509(11) [11509(a)(10)] allows the department to file an accusation and convene a hearing against a licensed dismantler who refuses to pay billed fees.
>
> 10. In cases where the fees are disputed and not yet paid, Vehicle Code Section 11509(11) [11509(a)(10)] provides only that the department review the validity of the fees before proceeding with the disciplinary action." From Appendix B.

Although the statutes have been renum-

bered, the language is still the same and the procedure is the same. The question before the Court is, does such procedure, or lack of it, comport with due process requirements of the Fourteenth Amendment to the United States Constitution?

Jurisdiction of this Court to review this matter stems from 28 U.S.C. § 1257(2).

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## TABLE OF AUTHORITIES

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## OPINIONS BELOW

The Fourth District Court of Appeal decision, contained in Appendix A, is reported in the official reports of California at 145 Cal.App.3d, 834, advance sheets not yet permanently bound.

The California Supreme Court's denial of hearing, filed October 5, 1983, is not reported except in that court's files. A notation of its denial will be made in the permanent, bound reports of the Court of Appeal decision. (Appendix D).

## GROUNDS FOR JURISDICTION IN THIS HONORABLE COURT

This action for declaratory relief draws into question the constitutionality of state statutes, California Vehicle Code Sections 4456.1, 11507(a)(8), 9263 and 11509(a)(10) on the ground that the statutes allow assessment and coerced collection of fines without a timely hearing in violation of the due process provisions of the Fourteenth Amendment to the United States Constitution.

The federal constitutional question was timely raised by appellants in their action for declaratory relief before the California Superior Court, San Diego, North County Division, maintained in that court through cross-motions for summary judgment, raised in briefs before the California District Court of Appeals, Fourth District, Division One, and reasserted in a request for rehearing before the District Court of Appeal, and in a Petition for Hearing to the Supreme Court of the State of California.

Appellant's timely Petition for Hearing was denied by the Supreme Court of the State of California on October 5, 1983.

Appellants' filed their Notice of Appeal to this Court on December 30, 1983.

The gist of the holding by the California Court of Appeal, Fourth District, Division One, hearing denied by the California Supreme Court, was that the hearing wherein revocation of license for non-payment of the fine was placed in issue was sufficient compliance

with hearing requirements of the due process clause; additionally the court held that payment by the licensee and the capacity to sue for refund was sufficient compliance with hearing requirements.

The Court of Appeals, hearing denied by Supreme Court of California, held as follows:

> "There are, as previously noted, formal means for a hearing and review available under the Administrative Procedure Act in which to contest the basis of the fees in a proceeding against the licensee for nonpayment, or, after payment of the assessment, the licensee may make a request for refund under section 42231,[2] file a claim with the state Board of Control (Gov. Code § 905.2) and, if necessary, bring a court action by which alleged errors may be reviewed with no jeopardy to the licensee or to liberty. The procedure here calls for a notice and hearing before a license revocation and, since failure to pay the penalty is a cause of license revocation, the validity of the assessment would be a principal issue in the proceeding.
>
> "The notice assessing a fee for failing to comply with the statute shifts the burden to contest onto the recipient and provides the recipient with a telephone number to use

> in the event of a disagreement as to the assessment. The recipient then has the opportunity to question the validity of the assessment fee. At this stage, the recipient has notice of the amount due, the reason, i.e., failure to file within statutory time limit, and an opportunity to respond to the assessing agency, the DMV. This process is not unlike many other statutory schemes providing penalties for failing to comply with the statutues. Due process is thus accorded.
>
> "There is no violation of due process in the statute here challenged. The procedure is fair and reasonable."

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Vehicle Code, Section 4456 reads:

"(a) When selling a vehicle, dealers and lessor-retailers shall use numbered report-of-sale forms issued by the department. The forms shall be used in accordance with the following terms and conditions.

(1) A copy of the report of sale shall be displayed on the vehicle before the vehicle is delivered to the purchaser.

(2) All fees and penalties due to register or transfer registration of the vehicle shall be paid to the department within 20 days from the date of sale. Penalties due for noncompliance with this paragraph shall be paid by the dealer or lessor-retailer. The dealer or lessor-retailer shall not charge the purchaser for such penalties.

(3) The sale shall be reported pursuant to Section 5901.

(4) An application in proper form to register or transfer registration of the vehicle shall be submitted to the

department. Applications for new vehicles shall be submitted within 20 days from the date of sale. Applications shall be submitted within 30 days from the date of sale.

(b) A vehicle displaying a copy of the report of sale may be operated without license plates or registration card until the license plates and registration card are received by the purchaser.

California Vehicle Code, Section 4456.1 provides:

"(a) A dealer or lessor-retailer who violates paragraph 1, 2, or 3 of subdivision (a) of Section 4456 shall pay to the department an administrative service fee of five dollars ($5) for each violation.

(b) A dealer or lessor-retailer who violates paragraph 4 of subdivision (a) of Section 4456 when selling a new vehicle shall pay to the department an administrative service fee as follows:

(1) If the application is submitted after 20 days but within 30 days from the date of sale - five dollars ($5).

(2) If the application is submitted after 30 days but within 40 days from the date of sale - ten dollars ($10).

(3) If the application is submitted more than 40 days from the date of sale-fifteen dollars ($15).

(c) A dealer or lessor-retailer who violates paragraph 4 of subdivision (a) of Section 4456 when selling a used vehicle shall pay to the department an administrative service fee as follows:

(1) If the application is submitted after 30 days but within 40 days from the date of sale-ten dollars ($10).

(2) If the application is submitted more than 40 days from the date of sale-fifteen dollars ($15).

(d) Each violation of paragraph 1, 2, or 3 of subdivision (a) of Section 4456 shall be, in addition to the obligation to pay an administrative service fee, a separate cause for discipline pursuant to Section 11613 or Section 11705.

(e) Failure to submit the application required by paragraph 4 of subdivision (a) of Section 4456 within 40 days from the date of sale shall be in addition to the obligation to pay an administrative service fee, a separate cause for discipline pursuant to Section 11613 or Section 11705.

(f) Nonpayment of an administrative service fee within 30 days after written demand from

the department shall be a cause for discipline pursuant to Section 1163 or Section 11705. [Emphasis Added].

The section which provides for administrative action against a dealer's occupational license is California Vehicle Code Section 11705(a)(8) which is as follows:

> "(a) The department, after notice and hearing, may suspend or revoke the license issued to a dealer, transporter, manufacturer, manufacturer branch, distributor, or distributor branch upon determining that the person to whom the license was issued is not lawfully entitled thereto, or has committed any of the following acts:
>
> ". . . . . .
>
> "(8) Has violated one or more of the terms and provisions of Division 3 (commencing with Section 4000) or a rule or regulation adopted pursuant thereto, or Section 1651, or subdivision (a) of Section 38200.

California Vehicle Code Section 11520 is lengthy and is cited in full at Appendix A, Page A-24. The gist

of the section is a series of time and reporting requirements controlling the conduct of the automobile dismantling business.

California Vehicle Code Section 9263 reads as follows:

> "Any automobile dismantler or other person who fails to comply with the provisions of Section 11520 shall pay an investigation service fee of fifteen dollars ($15)."

California Vehicle Code Section 11509(a)(10) reads:

> (a) The department, after notice and hearing, may suspend or revoke the license issued to an automobile dismantler upon the determination that the person to whom the license was issued is not lawfully entitled thereto or has committed any of the following acts:
>
> ". . . . . .
>
> "(10) Has failed to pay, within 30 days after written demand from the department, any fees or penalties due on vehicles acquired for dismantling which are not the subject of dispute. If the dismantler disputes the validity of such fees or penalties, the 30-day period shall not commence until the

department, after review, has determined the fee or penalty to be due."

## STATEMENT OF THE CASE

Escondido Imports, Inc., an automobile dealer and Billy D. Norman, an automobile dismantler, both licensed for their occupations by California, brought actions for declaratory relief seeking a judicial declaration that Vehicle Code §§ 4456.1 and 9263 were violative of due process provisions of the Fourteenth Amendment to the United States Constitution because no timely hearing process was provided before the respective licensee was compelled to pay the fee or fines assessed pursuant to the statutes. The two cases were consolidated for hearings and on December 3, 1981 the Superior Court of the State of California, County of San Diego, ruled that both sets of statutes provided sufficient due process.

Appellants filed Motions for New Trial (rehearing) which motions were denied on February 3, 1982. Appellants then appealed

to the California Fourth District Court of Appeal, Division One, and the matters were consolidated for hearing and decision. The trial court's judgments were affirmed, petition for rehearing was denied and a petition for hearing before the California Supreme Court was filed on September 19, 1983. The Petition was denied on October 5, 1983. (Appendix D).

Under the statutes at issue occupational licensees are assessed fines or "fees" without a hearing of any kind and if the licensee refuses to pay the fee an action is taken against its license on the grounds that the licensee did not pay a fine or "assessed fee" when due. The occupational license can be suspended or revoked for failure to pay the "fee". The first hearing available to a licensee who contests and refuses to pay the assessment is the proceeding wherein its license may be revoked.

The statutory scheme <u>may</u> give a licensee who contests the fee <u>successfully</u> relief from revocation or suspension, however

failure can result in the loss of occupational license.

The decision currently before this Court fails to address the fundamental question regarding the statutory scheme which Appellants have continually raised, which is "must a licensee risk his license in order to obtain a precollection hearing?". The alternative procedures for a licensee proposed by the California Court are:

1. To procede to defend the assessment in an action upon the license. (page 12-A, Court of Appeal Decision, Appendix A).

2. Pay the money and file a claim for refund. (page 12-A, Court of Appeal Decision, Appendix A).

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An additional element is added when, in sustaining the statutes, the Court notes that the licensee has an opportunity to "respond" to the assessing agency. (page 12-A, Court of Appeal Decision, Appendix A). The response opportunity, if it exists, is not provided for in the statutes.

Regarding the District Court's allusion to a procedure for obtaining a refund after payment, it fails to mention that California Vehicle Code Section 42231 (refund of erroneous fees) contains no provisions for a hearing process in any form.

THE FEDERAL QUESTION IS SUBSTANTIAL

It is fundamental that all citizens are entitled to due process prior to deprivation of property; only in extreme cases is a hearing after deprivation deemed sufficient. Sniadach v. Family Finance Corp. of Bay View, 359 U.S. 337, Goldberg v. Kelly, 397 U.S. 254. The property sought by government in the case at bar is innocent property,

money, which poses no threat to the public welfare if it remains with the citizen until after a hearing opportunity has been provided to determine whether the money should be paid over to the government.

The number of regulatory-administrative bodies and regulated licensees will continue to expand and the methods of regulation sustained by Courts is critical. Regarding the exercise of adjudicative process this Court has stated:

> "Regulatory commissions have been invested with broad powers. . .Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts. . All the more insistent is the need, when power has been bestowed so freely, that the inexorable safeguard of a fair and open hearing be maintained in its integrity. . . .the right to such a hearing is one of the rudiments of fair play. . .There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Ohio Bell Telephone Co. vs.
Public Utilities Commission,
301 U.S. 292, 304-305 (1937).

To constitute due process the statute itself must provide for appropriate pre-deprivation hearings:

> ". . .the essential validity of the law was to be tested not by what has been done under it, but by what may be its authority be done; and where a statute authorizes the taking of private property but makes no provision for hearing or notice, either actual or constructive, such defect is not supplied by the voluntary adoption by public officers of rules governing the situation. So in Security Trust Co. vs. Lexington, 203 U.S. 323 (51 L.Ed. 204, 27 S.Ct. 87, 89) a case involving the validity of an assessment, it was held that if a statute makes no provision for notice in any form it is not material that as a matter of grace or favor notice may be given. As the court stated, "it is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided by the statute." Nor can extra official or casual notice, or a hearing granted as a matter of discretion, be deemed a substantial substitute for the due process that the

> Constitution requires (Stuart vs. Palmer, 74 N.Y. 183 (30 Am.Rep. 289); Coe vs. Armour Fertilizer Works, 237 U.S. 413 (50 L.Ed. 1027, 35 S.Ct. 625); Louisville & Nashville R.R. vs. Stockyards Co., 212 U.S. 132 (53 L.Ed. 441, 29 S.Ct. (246).). . ." (Italics Added.) (See also 2 Am.Jur. 2d, Administrative Law, §401.)" From Merco Constr. Engineers vs. Los Angeles Unified School District, 274 Cal.App. 2d (1969).

The methods available for enforcement of rules by such agencies is clearly important to all citizens and governments.

Although the fines appear small, at least for now, the wholesale extraction of such fines can amount to a very significant collection in a short time. It is not the size of the fine that determines whether the question is significant. Thompson vs. City of Louisville, (1960) 362 U.S. 199. The matter cannot be relegated to de-minimus when whole industries are controlled by an agency with the power to take the license of one who refuses to pay a fine assessed without a hearing.

It is important to note that this case does not deal with a temporary withdrawal of benefits subject to a later hearing, nor to a cessation of government aid or employment. At issue here is the method and power which may be exerted to take innocent property from the citizen. At this point, unless this Court intervenes, occupational licensees in California will be compelled to pay fines or risk loss of their license in order to obtain their first hearing.

The court is invited to note that the method of hearing and taking evidenced is not at issue here. Undoubtedly a hearing regarding a small fine may be somewhat less formal than one for either a substantial fine or criminal sanction. No pre-collection hearing is provided by the statutory scheme at issue herein except one wherein the liecensee's exposure is not the fine, but loss of license.

The ability of the licensee to pay and sue for return of the "fee" or "fine" is not due process and such methods have

already been disapproved by this Court. Fuentes vs. Shevin, 407 U.S. 67, 82.

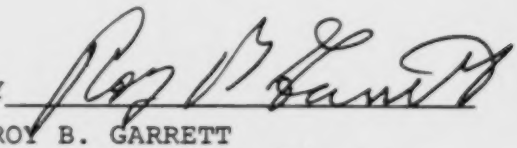
Appellants have continually raised the issues involved in the absence of any pre-collection statutory procedures offering them an opportunity for a hearing before payment. They have never maintained pre-assessment hearings were necessary. Appellants respectfully request that this Court review this statutory basis for the assessments, the statutory provisions for hearings, if any, and render its conclusion whether Appellants are tendered due process thereby.

## CONCLUSION

The decision of the Supreme Court of California and the California Court of Appeals, Fourth District, should be summarily reversed; alternatively, if the Court is of the opinion further briefing would be beneficial, the matter should

be accorded plenary view.

Respectfully Submitted,

BY 

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DATED: January 2, 1984

Appendix A

[Filed August 10, 1983]

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| ESCONDIDO IMPORTS, INC., Plaintiff and Appellant, v. STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, Defendant and Respondent. | 4 Civ. No. 26797 (Super. Ct. No. N 16587) |
| BILLY D. NORMAN, ETC., Plaintiff and Appellant, v. STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, Defendant and Respondent. | 4 Civ. No. 26802 (Super. Ct. No. N 16588) |
| | OPINION |

Before: COLOGNE, STANIFORTH, WIENER,
District Court of Appeal Justices

COLOGNE, District Court of Appeal, Justice

In cases consolidated for appeal, Billy D. Norman, doing business as Norman's Auto Dismantlers, a licensed automobile dismantler, and Escondido Imports, Inc., a licensed automobile dealer (both here referred to as licensee), appeal a judgment granting summary judgment to the State Department of Motor Vehicles (DMV) and denying summary judgment to the licensee on its complaint for declaratory relief. The gist of the complaint is Vehicle Code[1] section 4456.1, providing for an administrative service fee, and section 9263, providing for an investigation service fee, assessed against the licensee in certain events without advance notice or hearing, are unconstitutional because they represent a taking of a significant property interest without notice and an opportunity to be heard (U.S. Const., 14th Amend.; Cal. Const., art. I, §17).

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[1]All statutory references are to the Vehicle Code unless otherwise specified.

Generally, the statutes in question relate to reporting requirements detailed as to timing, and require the licensees to pay DMV $15, in the case of automobile dismantlers (§9263), or $5, $10, or $15, in the case of automobile dealers (§4456.1), when the licensee fails to submit in a timely fashion the required documents to DMV (appendices A and B contain somewhat more detailed descriptions of the statutory schemes involves and how they operate). The fee is assessed administratively by DMV usually by comparing the postmark or received stamp date with respect to the particular document with the dates stated in the document itself. An informal process exists by which the licensee may question and seek correction by DMV of the fee assessment, and corrections have been made by this means.

Failure to pay the fee is cause for disciplining the licensee (§§4456.1, subd. (d), 11509, subd. (a)(10), 11705, subd. (a)(8)). Any such disciplinary action is governed by the Administrative Procedure Act (Gov. Code,

§ 11500 et seq.; § 11509, subd. (c); § 11705, subd. (c)). At the hearing, the licensee may contest the allegations concerning nonpayment of administrative service fees, including the validity of the assessment, the arithmetic computations or the allegations of nonpayment.

Violations of the reporting requirements also may be the subject of a criminal prosecution for a misdemeanor or infraction (§ 11520, subd. (d); § 40000.1).

The licensees' concern here is the DMV can assess the fees against the licensee and revoke the license if the licensee fails to pay the fees without providing an opportunity to challenge the validity of the initial determination that a violation in fact occurred. The licensees also claim failure to pay the assessment will result in a hearing under the application section (§ 11509, subd. (a)(10), for dismantlers; § 11705, subd. (a)(8), for dealers) wherein the only issue presented at the hearing is whether the licensee failed to pay the fine. The uncontroverted declaration

of an attorney for DMV showing the merits of the fee can be contested, combined with the provisions making the Administrative Procedure Act applicable (§ 11509, subd. (c); § 11705, subd. (c)), demonstrate the last stated concern is unfounded.

We first address the assertion due process requires a preassessment hearing at which the licensee may challenge the validity of the initial determination that a violation in fact occurred.

How much process must be accorded depends upon the nature and stage of the proceedings, the temporary or permanent nature of the deprivation and the significance of the property interest involved. "We start with the basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and hearing." (Beaudreau v. Superior Court, 14 Cal.3d 448, 458). The United States Supreme Court "consistently has held that some form of hearing

is required before an individual is finally deprived of a property interest." (Mathews v. Eldridge, 424 U.S. 319, 333 [96 S.Ct. 893, 902]). Justice Tobriner, however, once stated:

> "Due process cannot become a blunderbuss to pepper proceedings with alleged opportunities to be heard at every ancillary and preliminary stage, or the process of administration itself must halt. Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities. Due process is not a frozen Draconian code but the concept that in some one of multivarious procedures the accused shall be afforded before judgment the right to a full hearing." (Dami v. Department of Alcoholic Beverage Control, 176 Cal.App.2d 144, 151).

We are taught in Mathews v. Eldridge, supra, 424 U.S. 319 [96 S.Ct. 893], that identification of the specific dictates of due process generally requires consideration of three distinct factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute pro-

> cedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and adminstrative burdens that the additional or substitute procedural requirement would entail. See e.g., Goldberg v. Kelly, supra, at 263-271." (424 U.S. at p. 335 [96 S.Ct. 893, 903]).

Mathews considered termination of social security disability benefit without first conducting an evidentiary hearing. The agency, in Mathews, merely sent a letter to the recipient including a statement of the reasons for the termination of the disability benefit. Balancing the various factors, Mathews upheld the statute under the due process challenge.

In Civil Service Assn. v. City and County of San Francisco, 22 Cal.3d 552, imposition of five-day suspensions on civil service employees without prior hearing was permitted, the court using not only the Mathews analysis, but also considering the following passage from Skelly v. State Personnel Bd., 15 Cal.3d 194:

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> " . . . In balancing such "competing interests involved" so as to determine whether a particular procedure permitting a taking of property without a prior hearing satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property proves to have been wrongful. . .' (15 Cal.3d at p. 209; italics in original; see 22 Cal.3d at p. 561.)

We consider these Mathews-Skelly factors as follows:

First, we believe the private interest involved in the assessment of the $5, $10, or $15 service fee is relatively insignificant, particularly when compared to the private importance of such things as disability payment termination or short term suspension from work as in Mathews, supra, and Civil

Service Assn., supra. Though the licensees raise the aura of imminent criminal prosecution or disciplinary action against the license as a result of nonpayment of the fee, the record does not support that hypothesis. In fact, considering the showing DMV makes adjustments when corrections are needed, the record supports the view this correcting practice is and will be followed. The presence of the Administrative Procedure Act remedial process obviates any direct concern for prosecution or disciplinary action against the licensees as a result of non-payment of the fee. The private interest directly involved here is the property interest involved in the licensee's loss of $5, $10, or $15, not the licensee's liberty interest or interest in making a livelihood. The latter two interests are involved, at most, only speculatively and and indirectly.

The second consideration under Mathews, supra, risk of an erroneous deprivation of the affected interest is minimal as well.

Each licensee is in control of the operative facts giving rise to the need to comply as well as the timing of the compliance with the statute. The licensee knows, for example, of the sale of the vehicle or of its acquisition for dismantling and the licensee is in charge of filling out and delivery of the required papers. The dates when these things are done or to be done are not reasonably susceptible to factual dispute.

The situation of the licensee is much like that of the state employee in Willson v. State Personnel Bd. (1980) 113 Cal.App.3d 312. Willson held the state employee could be terminated without preremoval hearing safeguards as spelled out in Skelly, supra, 15 Cal.3d 194, upon being absent without leave for five consecutive working days. Willson noted the statute there involved gave "fair notice of exactly when, why and how an employee constructively resigns his position. . .and in the nature of such matters [5 working days of A.W.O.L.], conduct giving rise to auto-

matic resignation is rarely, if ever, susceptible to factual dispute." (113 Cal.App.3d at p. 317.) Thus, Willson concluded the "risk of erroneous applications of the statute is minimal and would in any event scarcely be diminished by provision for a preremoval hearing." (Ibid.)

We consider the statutory scheme involved here to give the same fair and exact notice to the licensees of their duties as did the statute in Willson. The matter is not susceptible to more than a nominal risk of erroneous application of the statute, and thus the licensee's risk of erroneous deprivation is minimal.

Finally, we consider the third Mathews factor, the government's interest, including the function involved and the fiscal and administrative burdens the additional procedural requirement would entail. The state has a substantial interest in receiving the prescribed information accurately and on time in order to maintain complete and up to date

records concerning the number, nature and ownership or right to possession of vehicles licensed and registered in the state and to facilitate the detection and recovery of stolen vehicles. Records about sold vehicles and vehicles acquired for dismantling are in furtherance of achieving these goals. Though the record before us does not contain an indication of the number of transfers and events subject to the reporting requirements, it is apparent the numbers are enormous and the fiscal and administrative burdens of providing an additional procedural requirement in every case of an assessment would likewise be great.

We conclude, given the great interest of the state and burden on it applying an additional procedural requirement, when compared with the minimal private interest directly involved and the low probability of error in the assessment, due process does not require a preassessment hearing as the licensee requests.

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There are, as previously noted, formal means for a hearing and review available under the Administrative Procedure Act in which to contest the basis of the fees in a proceeding against the licensee for nonpayment, or, after payment of the assessment, the licensee may make a request for refund under section 42231,[2] file a claim with the state Board of Control (Gov. Code, § 905.2) and, if necessary, bring a court action by which alleged errors may be reviewed with no jeopardy to the licensee or to liberty. The procedure here calls for a notice and hearing before license revocation and, since failure to pay the penalty is a cause of license revocation, the validity of the assessment would be a principal issue in the proceeding.

The notice assessing a fee for failing to comply with the statute shifts the burden to contest onto the recipient and provides the recipient with a telephone number to use in the event of a disagreement as to the assessment. The recipient then has the opportunity

to question the validity of the assessment fee. At this stage, the recipient has notice of the amount due, the reason, i.e., failure to file within statutory time limit, and an opportunity to respond to the assessing agency, the DMV. This process is not unlike many other statutory schemes providing penalties for failing to comply with the statutes. Due process is thus accorded.

There is no violation of due process in the statute here challenged. The procedure is fair and reasonable.

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DISMANTLERS -- STATUTORY SCHEME AND ADMINISTRATION

Section 9263 provides: "Any automobile dismantler or other person who fails to comply with the provisions of Section 11520 shall pay an investigation service fee of fifteen dollars ($15)." Generally, section 11520 requires licensed automobile dismantlers "who acquired, for the purpose of dismantling, actual possession, as a transferee, of a vehicle" to notify DMV, to transmit ownership documents and to wait ten days before dismantling a vehicle.[3] The dismantler must send "notice of acquistion" to DMV, with a copy to the Department of Justice, within five days after acquiring a vehicle which will be dismantled. The dismantler cannot begin dismantling a vehicle until ten days have elapsed after mailing notice of acquisition. Within 90 days after the date of acquistion, the dismantler must send the vehicle's documents evidencing ownership (or certified letter

of demand for the documents) and license plates (or certificate of license plate destruction) to DMV.

Imposition of the investigation service fee in connection with the notice of acquisition occurs on the basis of comparison of the postmark on the envelope used to mail the notice with the date of acquisition shown on the notice form, or where there is no postmark, by subtracting five days from the date on the DMV received stamp and comparing with the date of acquisition shown on the notice form.

The $15 investigation service fee under section 9263 applies to any violation of section 11520. Moreover, section 11509, subdivision (a)(10), provides:

> "(a) The department, after notice and hearing, may suspend or revoke the license issued to an automobile dismantler upon the determination that the person to whom the license was issued is not lawfully entitled thereto or has committed any of the following acts:
>
> ". . . . . .

> "(10) Has failed to pay, within 30 days after written demand from the department, any fees or penalties due on vehicles acquired for dismantling which are not the subject of dispute. If the dismantler disputes the validity of such fees or penalties, the 30-day period shall not commence until the department, after review, has determined the fee or penalty to be due."

Thus, a dismantler's failure to pay the $15 investigation service fee within the applicable 30-day period is a ground for suspension or revocation of his license. It is also a misdemeanor to violate section 11520 (§ 11520, subd. (d)).

Both the licensee and the DMV point out the record shows DMV informally makes adjustments to investigation service fee assessments on the basis of requests for corrections by the dismantler. The billing form used by DMV invites any questions regarding the billing to be made by telephoning a given number.[4] Over the period May 1978, through June 1980, $225 in

adjustments to six of the licensee's billing were made by DMV.

Moreover, the Administrative Procedure Act (Gov. Code, § 11500 et seq.) governs any disciplinary action by the DMV against the license for failure to timely pay the fees (§ 11509, subd. (c)). If the licensee elects to defend against the allegations in such a proceeding, the licensee may contest the allegation concerning the fees, including the validity of the assessment, the arithmetical computations or the allegation of nonpayment, and this may be done even though the licensee may not have sought an informal review of the assessment.

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DEALERS -- STATUTORY SCHEME
AND ADMINISTRATION

As a licensed automobile dealer, the licensee here has paid adminstrative service fees in the amounts of $5, $10, or $15 to DMV pursuant to section 4456.1 for failing to comply with section 4456 which imposes certain reporting requirements on the licensee. Generally, under section 4456, the licensee is required to use numbered "report-of-sale" forms issued by DMV. A copy of the report of sale is required to be displayed on the vehicle before it is delivered to the purchaser, and within 20 days of the date of sale the licensee must pay DMV all fees and penalties due to register or transfer registration of the vehicle. The sale must be reported according to section 5901 which requires the licensee to give notice of transfer to DMV within five days of any transfer of a vehicle. Section 5901 also requires for certain vehicles a report of the mileage shown on the odometer to

be included on the form. Finally, section 4456 requires the application to register or transfer registration of a vehicle to be submitted by the licensee to DMV within 20 days from the date of sale in the case of new vehicles, or within 30 days if the vehicle is used.

Section 4456.1 requires the licensee to pay DMV the $5, $10, or $15 administrative service fee depending on the time the application or report is submitted, If, for example, a registration application for a new vehicle is not submitted within 20 days of the sale but is submitted within 30 days, the administrative service fee is $5. If the application is submitted over 30 days after the sale but before 40 days have passed, the administrative service fee is $10. For submission of the registration application for the new vehicle after 40 days, the administrative service fee is $15. A similar schedule of administrative service fees pertains to used vehicle sales

and the submission of registration applications, with the amount being $10 if the submission occurs over 40 days from the date of sale. The administrative service fee is imposed in terms of the timing requirements as shown in the following portion of DMV employee Suzanne E. Ross' declaration:

> "The dealer notice is mailed to DMV Headquarters in Sacramento by the dealer and is determined to be untimely if the postmark date is more than five days after, but not including, the date of sale. If there is no postmark, the policy is to subtract 5 (five) says from the date received in the department.
>
> "The registration fees or application is submitted to a Field Office which determines whether an ASF [administrative service fee] is to be assessed for late submission. This is determined by subtracting the number of days between the date of sale and the date the application was submitted, either by mail or personal delivery. If the number of days is in excess of the number of days allowed by law, an ASF is assessed. If registration fees or an application is determined to be in arrears, notification of such determination is sent to Headquarters by the Field Office. . . . ."

Section 4456.1 also makes violations of the requirements of section 4456, as well as failure to submit the registration application within 40 days, as separate cause for disciplining the licensee. Section 4456.1 subdivision (f), further makes the non-payment of an administrative service fee within 30 days after written demand from DMV a separate cause for disciplining the licensee. As in the case of dismantlers, any such disciplinary action is governed by the Administrative Procedure Act (Gov. Code § 11500 et seq.; § 11613, subd. (c); § 11705, subd. (c)), and at the hearing, the licensee may contest the allegations concerning nonpayment of administrative service fees, including the validity of the assessment, the arithmetic computations or the allegations of nonpayment.

A licensee may seek an informal review of an assessment, causing adjustments to the administrative service fee assessment.

The billing form used by DMV invites any questions concerning the billing to be made by telephoning a given number.[5] The record shows the licensee here had two $10 billings deleted by DMV due to licensee inquiries in December 1980 and April 1981.

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FOOTNOTES

2/ "Whenever any application is made under this code and the application is accompanied by any fee which is excessive or not legally due, or whenever the department in consequence of any error either of fact or of law as to the proper amount of any fee or any penalty thereon or as to the necessity of obtaining any privilege under this code collects any fee or penalty which is excessive, erroneous, or not legally due, the person who has paid the erroneous or excessive fee or penalty, or his agent on his behalf, may apply for and receive a refund of the amount thereof as provided in this article, or the department may refund the same within three years after the date of the payment or collection."

3/ Section 11520 reads:

"(a) A licensed automobile dismantler who acquired, for the purpose of dismantling, actual possession, as a transferee of a vehicle of a type subject to registration under this code:

"(1) Shall within five calendar days, not including the day of acquisition, mail a notice of acquisition to the department at its headquarters.

"(2) Shall within five calendar days, not including the day of acquisition, mail a copy of the notice of acquisition to the Department of Justice at its headquarters.

"(3) Shall not begin dismantling until 10 calendar days have elapsed after mailing the notice of acquistion. In the alternative, dismantling may begin any time after the dismantler complies with the provisions of paragraph (4).

"(4) Shall deliver to the department, within 90 calendar days of the date of acquistion, the documents evidencing ownership and the license plates last issued for the vehicle. Proof that a registered or certified letter of demand for the documents was sent within 90 days of the date of acquisition to the person from whom the vehicle was acquired may be submitted for documents that cannot otherwise be obtained. A certificate of license plate destruction, when authorized by the director, may be delivered in lieu of the license plates.

"(5) Shall maintain a business record of all vehicles acquired for dismantling. The record shall contain the name and address of the person from whom such vehicle was acquired; the date the vehicle was acquired; license plate number last assigned to the vehicle; and a brief description of the vehicle including its make, type, and the vehicle identification number used for registration purposes. The record required by this subdivision shall be a business record of the dismantler separate and distinct from the records maintained in those books and forms furnished by the department.

(b) The provisions of paragraphs (1) and (2) of subdivision (a), shall not apply to vehicles acquired pursuant to Section 11515 or 22705 of this code or Sections 3071, 3072, or 3073 of the Civil Code.

"(c) Any person, other than a licensed dismantler, desiring to dismantle a vehicle of a type subject to registration under this code shall deliver to the department the certificate of ownership, registration card and the license plates last issued to the vehicle before dismantling may begin.

"(d) Any person who violates this section is guilty of a misdemeanor. Any person not licensed under the provisions of this chapter who is convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than five days or more than six months or by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500) or by both such fine and imprisonment; and upon a second or any subsequent conviction, by imprisonment in the county jail for not less than 30 days nor more than one year or by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000) or by both such fine and imprisonment."

4/ This billing form also contains the following statements:

"This is your statement of service fees due the Department for Notice of Acquisition and/or Dismantling Reports which were filed late or have not been received." (Located near top of form).

"This is the first and only bill you will receive. Failure to pay within 30 days of this demand may be grounds for administrative action against your license." (Located at bottom of form).

5/ The billing form also contains the following statement:

"Based on information received from our Department of Motor Vehicles Field Office in connection with the report of sale transactions completed by your firm and/or report of sales notices received by this unit, the following administrative service fees have been

determined to be due." (Located near top of form.)

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APPENDIX B

LETTER FROM CALIFORNIA DEPARTMENT OF MOTOR VEHICLES FROM CLERK'S TRANSCRIPT, PAGE 146-148, NORMAN VS. DEPARTMENT OF MOTOR VEHICLES

Office of the Director
DEPARTMENT OF MOTOR VEHICLES
P. O. Box 1878
Sacramento, CA 95809

September 8, 1976

Erwin Sobel, Esq.
6380 Wilshire Boulevard
Suite 1515
Los Angeles, CA 90048

RE: NORMAN'S AUTO DISMANTLING

Dear Mr. Sobel:

As you know, Mr. Norman and the Department of Motor Vehicles have been in frequent contact over the last several months, both by letter and by phone, on the subject of a $105 fee assessed and collected by the department from Norman's Auto Dismantling. In accordance with your wishes, we are henceforth directing our communications in this matter to you.

As the request of the Director, I have personally reviewed the validity of our original billing dated February 26, 1976. I have reviewed the relevant statutes and have spoken with Mr. Norman, Investigator Strauss, and Mr. Lema. Also, I have reviewed the investigator's inventory cards and the reports and notices filed for each of the 7 vehicles whose descriptions accompanied the billing. I have

determined the following:

1. When Investigators Strauss and Anderson reviewed Mr. Norman's business on August 21, 1975, the subject vehicles had already been dismantled, despite the fact that they had been acquired within 10 days of the date of the review and have not been "cleared" in accordance with Vehicle Code Section 11520(4).

2. The licensee violated Vehicle Code Section 11520(c) 7 times and was billed $120 in investigation service fees on February 26, 1976.

3. The department has previously informed Mr. Norman that of the $120 originally billed, only $105 is legally due to the department.

4. Mr. Norman paid $105 in investigation service fees sometime in May of this year (A customer's receipt for $105 dated June 16, 1976, is attached hereto).

5. On or about June 9, 1976, Mr. Norman attempted to file a claim for $105 with the State Comptroller and submitted therewith a bill and a receipt. That office forwarded the documents to this department for our review. Those documents are also attached hereto.

6. The department has authority to assess such fees under Vehicle Code Sections 9263 and 11520.

7. The investigation service fee is not intended as a criminal sanction, but is assessed for the purpose of reimbursing the department for the added administrative expenses occasioned by violations of Vehicle Code Section 11520.

8. With respect to the billing of investigation service fees, the Legislature has not provided for a hearing before the department in the absence of disciplinary action against the license.

9. Vehicle Code Sections 11509(11) allows the department to file an accusation and convene a hearing against a licensed dismantler who refuses to pay billed fees.

10. In cases where the fees are disputed and not yet paid, Vehicle Code Section 11509(11) provides only that the department review the validity of the fees before proceeding with disciplinary action.

11. In cases where the fees are disputed but have been paid nonetheless, Vehicle Code Section 42231 authorizes the department to refund the fees only when the fees are excessive, erroneous, or not legally due.

12. When payment has been made and an application for refund has been filed with the agency and denied, a claim may be filed with the State Board of Control pursuant to Government Code Section 905.2.

13. The relevant statutes meet

constitutional standards. Even if we believed they did not, it must be recognized that an administrative agency is not the appropriate body to overrule legislative enactments.

14. The department's billing was accomplished in accordance with our usual procedures and in full compliance with the law.

Based on all of the above, the department believes that its billing was valid and must decline to refund Mr. Norman's money. Also, we decline to convene a hearing on the issue of whether Mr. Norman did, in fact, dismantle vehicles prematurely. Had your client refused to pay the fees, the department would undoubtedly have instituted an administrative action against his license on the basis of Vehicle Code Section 11509(11), and a hearing would have been held. But given the fact of payment, we are not authorized to offer your client a hearing and would be without statutory guidelines as to what procedure to follow even if we did so. Of course, a hearing is authorized and required by Vehicle Code Section 11509 (6) in the event the department should choose to file an administrative action against Mr. Norman's license, but we do not feel that the violations committed by your client are sufficiently serious to warrant such action and to thereby place his license in jeopardy. Similarly, we have not sought and do not intend to seek a criminal prosecution through the district attorney's office. However, if it is your client's desire that we file a formal accusation

against him and grant him a hearing before the Office of Administrative Hearings, charging him with violating Vehicle Code Section 11520, please notify me as soon as possible and the department will comply with the request.

I trust this letter satisfactorily explains the department's position. If I can be of further assistance, please do not hesitate to call me here in Sacramento ((196) 445-6601).

Very truly yours,

/s/ Houston N. Tuel, Jr.
HOUSTON N. TUEL, JR.
Legal Counsel

Attachments

cc: Iva Rollens
Office of State Comptroller

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Appendix C

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division One

BILLY D. NORMAN, etc.

Plaintiff & Appellant,

vs.

STATE OF CALIFORNIA, etc.

Defendants & Respondents.

4 Civ. No. 26797

SUPERIOR COURT NOs. N 16588 and N 16587

ESCONDIDO IMPORTS, INC.,

Plaintiff & Appellant

THE COURT:

vs.

STATE OF CALIFORNIA etc.

Defendants & Respondents.

ORDER

THE COURT:

The petition for rehearing is denied.

/s/ Cologne
Acting Presiding Justice

Copies to ALL PARTIES

Appendix D

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

OCT 5, 1983

I have this day filed Order

HEARING DENIED

In re: 4 Civ. No. 26797

ESCONDIDO IMPORTS, INC.

vs.

STATE OF CALIF., DMV

Respectfully,

Clerk

Appendix E

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| ESCONDIDO IMPORTS, INC., Plaintiff/Appellant, vs. STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, Defendant/Respondent. | NO. 4 CIVIL 26797 (Superior Court Case No. N 16587) |
| BILLY D. NORMAN, ETC., Plaintiff/Appellant, vs. STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, Defendant/Respondent. | NO. 4 CIVIL 26802 (Superior Court Case No. N 16588) |

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN THAT ESCONDIDO IMPORTS, INC., and BILLY D. NORMAN, et al., the appellants above named, hereby appeal to the Supreme Court of the United States from the final order denying hearing and affirming the judgment of the Court of Appeal, Fourth District State of California;

the denial of hearing and affirmance of judgment occured October 5, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

By/s/ RBG

ROY B. GARRETT, Attorney for Appellants ESCONDIDO IMPORTS, INC., and BILLY D. NORMAN
225 E. Third Avenue
Escondido, CA 92025

Telephone: (619)747-2850

Appendix F

DECLARATION OF COUNSEL RE SERVICE AND MAILING OF NOTICE OF APPEAL TO CALIFORNIA SUPREME COURT

I, ROY B. GARRETT, declare as follows:

I am the attorney of record for Appellants herein; my business address is 225 E. Third Avenue, Escondido, California. I served a copy of the Notice of Appeal to the California Supreme Court with copies to the Defendant/Respondent, a copy to the Clerk of the Court of Appeal, to Honorable Don Martinson, Trial Judge in Superior Court, to the addresses indicated below, by placing said copies in the United States Mail at Escondido, California on December 30, 1983:

Janelle B. Davis, Esq.
Deputy Attorney General
110 W. A Street, Suite 700
San Diego, California 92101

Clerk of the Court of Appeal
Fourth Appellate District
Division One
6010 State Building
1350 Front Street
San Diego, California 92101

Honorable Don Martinson
Judge of the Superior Court
San Diego County
325 S. Melrose
Vista, California 92083

I affixed first class postage, pre-paid envelopes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 2nd day of January, 1984 at Escondido, California.

BY 
ROY B. GARRETT, Declarant

Appendix G

COUNSEL'S STATEMENT REGARDING A SIMILAR CASE PENDING

Counsel for Appellants is also counsel in another case involving the constitutionality of California Vehicle Code Sections 9263 and 11509(a)(10) Pat & Gary's Discount Auto Parts v. Director, Department of Motor Vehicles, No. 276862-0. That case has been decided by the California Court of Appeals, Fifth Appellate District and the Court, in denying the dismantlers contentions, relied upon Norman vs. California Department of Motor Vehicles. Further appeals will be filed in the Pat and Gary's case.

The point to be made is that in Pat and Gary's the dismantler lost his license for 15 days for having failed to pay the fine. Although he was found not to owe $45 of the fines, his license was suspended for 15 days for failure to pay $2,475. The statutes involved were the same as in this case. Actual suspension, except for two days, was sus-

pended on condition the fines be paid and a period of probation was imposed.

Counsel realizes that since Pat and Gary's vs. Director, Department of Motor Vehicles is not final there is no appropriate record for this Court to consider. He therefore verifies to this Court that the findings and orders in Pat and Gary's vs. Director, Department of Motor Vehicles, case number 276862-0 are as represented herein, that the California Court of Appeal, Fifth District, has followed Norman v. Department of Motor Vehicles and that Pat and Gary's will file appeal to the California Supreme Court.

It is safe to assume that either the California Supreme Court will take a fresh look and revise the California view or that a concrete case of license revocation, in addition to the declaratory actions at bar, will be presented to this Court.

BY Roy B. Garrett
ROY B. GARRETT